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4
5 TRANSGENDER LITIGANTS IN THE COURT
6 SYSTEM:

7 Providing Equal Access and Impartial
8 Justice - Part Two

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10 Participants:

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1 JUDGE MOULTON: Welcome to Part Two of
2 Transgender Litigants in the Court System - Providing
3 Equal Access and Impartial Justice. My name is Peter
4 Moulton and I'm the supervising judge of civil court
5 in New York County. I would like to thank Judge
6 Juanita Bing Newton, dean of the Unified Court
7 System's Judicial Institute, and her very able staff
8 at the Judicial Institute, for supporting this
9 program.

10 Today's program has three parts: First,
11 we'll have a recap of day one of the program, which
12 concerned general issues facing transgender people in
13 court. The recap will be presented by Pooja Gehi, a
14 staff attorney at the Sylvia Rivera Law Project. The
15 second part of today's program will concern the
16 experience of transgender people in name-change
17 proceedings. Finally, the third portion of today's
18 program will concern the experience of transgender
19 people in various family-court proceedings. I hope
20 you enjoy the program. Thank you for coming.

21 Ms. Gehi?

22 POOJA GEHI: Thank you, Judge Moulton. And
23 thank you all for being here. And thank those of you who
24 were here two Fridays ago for the first part of this
25 program.

1 I'm just going to start by doing a pretty short
2 recap of things that we went over two weeks ago. So,
3 starting with ethical obligations of the court. Judicial
4 officers, pers - - - court personnel and officers of the
5 court are responsible for assuring that transgender adults
6 and youth are treated equitably and fairly by everyone
7 they meet in the courthouse and by everyone from whom they
8 receive services. Judicial officers, court personnel and
9 officers of the court are responsible for developing
10 cultural competency in working with transgender adults and
11 youth to carry out their ethical obligations.

12 So then I'm just going to go over some
13 components of cultural competency. And when we talk about
14 cultural competency, we mean - - - in transgender issues,
15 we're talking about breaking down terminology, about
16 gender, sex, sexual orientation, identifying and
17 challenging the messages we have received from our
18 cultures, families, religions and peers that may influence
19 our beliefs or actions, deepening our understanding about
20 transphobia in society, and learning ways to support
21 transgender people in court proceedings and our personal
22 lives.

23 Okay, so these are just some transgender terms
24 of art and they're terms that are used by advocates,
25 transgender people in the legal, social and political

1 advocacy, and they're basic - - - they're mostly a
2 baseline for communication about gender issues in the
3 courtroom. And other terms can be raised or preferred in
4 individual contexts. It's really important just to make
5 sure that you're reflecting terms ahead that people use to
6 self-identify themselves.

7 We use the term "transgender" or sometimes
8 "transgendered" - - - "ed" - - - but we don't really use
9 that one, but some people do self-identify as
10 transgendered. This is an umbrella term; it applies to a
11 - - - a wide variety of people who transgress gender norms
12 in some way. Typically the term is applied to people who
13 dress or act in a way that's different or opposite from
14 what is considered normal for their birth sex.

15 Many people might identify as transgender; these
16 people might include: those who dress in a certain way,
17 in a way that's associated with one sex, even though they
18 were raised as another sex; people who identify as a
19 particular sex or gender even though they were raised as a
20 different sex or gender; people who simply do not identify
21 with either male or female; and people who identify with
22 some parts of one sex and some parts of another sex or
23 gender.

24 Then I just want to just talk for a second about
25 the difference between gender and sex. The World Health

1 Organization defines gender as the result of socially
2 constructed ideas about the behavior, actions and roles a
3 particular sex performs. So we know these are two
4 different things that we're talking about. And we - - -
5 when we're talking about transgender, we mean a person
6 whose gender identity or expression is different or
7 doesn't match that they - - - their assigned birth sex.

8 So, some advocates use the term "sex" to refer
9 to anatomical features like - - - such as chromosomes,
10 genitals, secondary sex characteristics like facial hair.
11 And we - - - we use the term "assigned sex"; and when we
12 say "assignment" in this context, we're typically
13 referring to non - - - the nonconsensual act of assigning
14 a gender to a person that happens at birth.

15 And we just want to name why we say "assigned
16 sex" and not "biological sex", and it's just because we're
17 emphasizing the fact that this decision is usually - - -
18 are almost always - - - always - - - made by a third
19 person, either a doctor or parent, from the moment a child
20 is born. Right? And - - - and the reality is that one in
21 a hundred babies are born with sex characteristics that
22 don't actually fit in - - - neatly into traditional
23 concepts of male or female. And we quoted the Intersex
24 Society of North America's study for that, and the ISNA is
25 generally who we refer to on intersex issues as experts in

1 the field. And we also think "assigned sex" is more
2 accurate, just because many biological sex characteristics
3 can indeed change in both transgender people and
4 nontransgender people over time and throughout people's
5 lives.

6 And then - - - uh-oh, why I'm missing - - - so
7 then we use the term "gender expression" to talk about the
8 way a person expresses or represents their gender to the
9 world; and these are things like mannerisms, postures, way
10 of speaking, way of dressing, actions like holding the
11 door, not holding the door open for somebody. And - - -
12 and all of these things are influenced by race and class,
13 culture, family roles, religion, peers and media. And
14 gender - - - when we use the term "gender-nonconforming",
15 we're talking about qualities and aspects that refer - - -
16 or characteristics or mannerisms that a person may have
17 which don't match the assumptions of the sex that they
18 were assigned at birth, or don't match the assumptions
19 about a way that a particular gender - - - society
20 believes a particular gender should act or behave.

21 We really always want to be focusing on is
22 people's gender identity, and people's gender identity is
23 their sense of self, their internal personal sense of
24 their gender and who they are. Gender identity is innate;
25 we all have one; most people know theirs from a very young

1 age. Most people's gender identity remains the same no
2 matter what they look like, act like, or what medical
3 procedures they've had. Sometimes people's gender
4 identities can change over time as they grow or get to
5 know themselves better. Many people have gender
6 identities that don't match their assigned sex at birth.

7 When we use the term "transgender", we're
8 talking about somebody whose gender identity or expression
9 doesn't match their assigned birth sex. And I just wanted
10 to name the word - - - the word "cisgender", which is a
11 term that people use to talk about people whose gender
12 identity matches the sex they were assigned at birth. We
13 can think of it as an antonym to "transgender", and it
14 comes from the Latin root "cis" being opposite of "trans".
15 Sometimes people also say - - - "non-trans" and "trans"
16 when describing a transgender person or not-transgender
17 person.

18 Just really quickly, some terms to avoi - - - or
19 some terms - - - sorry - - - to use to describe gender,
20 and this is how a lot of people self-identify: as women,
21 female, trans women, male-to-female or M-to-F, women of
22 transgender experience, gender-nonconforming; man, male,
23 trans man, female-to-male, man of transgender experience,
24 or gender-nonconforming man. And then some people self-
25 identify as butch, butches or femmes, AG, aggressive,

1 genderqueer, gender non-conforming, gender fluid, or
2 genderquestioning. And it's always just important to
3 reflect back the way that people self-identify.

4 And just some terms to avoid; these terms are -
5 - - have a lot of outdated, discriminatory, complicated,
6 loaded meanings. It's really best to avoid using them,
7 even though sometimes people might use them to self-
8 identify. And these terms are: he-she, shemale,
9 transvestite, tranny, cross-dresser, "cross-dresser" is -
10 - - being not necessarily a negative term but a term that
11 refers to a very specific group of people and a specific
12 identity.

13 I just want to emphasize that gender and sexual
14 orientation are different things. Gender identity refers
15 to the way a person self-identifies their gender. Sexual
16 orientation refers to a person - - - to - - - who somebody
17 is attracted to. And transgender people can be all - - -
18 all different kinds - - - sexual - - - have all different
19 sexual orientations. So trans people can be straight,
20 gay, queer, bisexual, none of those things.

21 And just, there's a lot of laws on a state and
22 federal level, on the city level, that protect transgender
23 people on the basis of their gender identity and
24 expression. I just wanted to name the New York City
25 Commission on Human Rights Title 8, Section 102, of the

1 New York City Administrative Code, which prohibits
2 discrimination on the basis of gender identity and
3 expression, and applies to landlords, public
4 accommodations, government agencies, and it prohibits
5 harassment, mistreatment, violence or other forms of
6 discrimination based on actual or perceived transgender
7 status, gender identity or gender expression.

8 And then the last section I'm going to go over
9 is just some tips that we went over in the first part, in
10 a lot more detail, and I'm just going to go through them
11 pretty quickly, and they're all things that are pretty
12 easy to do to make sure that trans people's gender
13 identity is affirmed in the courtroom. The first one is,
14 challenging assumptions. A vital part of cultural
15 competency is the willingness to challenge what you know
16 and be open to the experiences of people who are
17 differently situated. Challenge assumptions about gender;
18 it means thinking critically about the impact of gender
19 roles and expectations on both cisgender people and
20 transgender people; also, looking really closely at
21 structures, like intake forms, bathrooms, hiring
22 practices, security checkpoints, to make sure that
23 transgender experiences are included and accounted for.
24 And some of those things are just thinking about that
25 sometimes people's identification cards' gender marker

1 doesn't match their - - - their gender presentation,
2 right, and to not make that an issue.

3 And then the second thing is just affirming
4 preferred names, which we're going to talk a lot - - - a
5 lot more about in the next section. Many trans people
6 prefer names that match their gender identity and
7 expression and are different from the name that they were
8 given at birth. And it's really always important to just
9 make sure you use the preferred name of a transgender
10 litigant. And if their name is legally changed, it's
11 important to update all of their information on their
12 court records. So some transgender litigants haven't
13 legal - - - had a legal name change and it's still
14 important to try to find a way to use their preferred name
15 if at all possible.

16 It's also really important to affirm people's
17 gender. And when we talk about affirming people's gender,
18 we mean referring to people with the pronoun that they
19 choose to self-identify with. Sometimes we don't know,
20 and it's totally appropriate to ask for a bench conference
21 or a sidebar to briefly check in with the litigant and
22 say, "What do you" - - - "What do you prefer? How would
23 you like me to call you?"

24 It's also - - - just, if you don't know, it's
25 good to not make assumptions, and avoid using terms like

1 "mister", "miss", until you're certain about the gender
2 identity of the litigant. Some alternatives are to just
3 use the person's role in the case, so you could say "the
4 def" - - - "Will the defendant please stand up?" or "Will
5 the plaintiff please stand up?" And it's important to
6 just not - - - to not assume that a litigant identifies as
7 a particular gender, just because of their legal or
8 preferred name or appearance.

9 So, generally when we - - - if we use the
10 party's preferred name as much as we can, as much as we
11 know it, and if we don't know the person's preferred name,
12 it's okay to use the last name; it's better than using the
13 - - - a not-affirming name. So we could say "Rodriguez",
14 "parties on Smith", "Plaintiff Smith" or "Defendant
15 Rodriguez".

16 It's really important to avoid questions that
17 are not relevant to the case. So when thinking about what
18 you're asking, think about whether it's necessary for the
19 purposes of the proceeding or the conversation. And
20 sometimes we say, if you wouldn't ask a nontrans person
21 that question, then you probably don't need to ask a trans
22 person that question either, unless it's directly related
23 to their case.

24 Avoid questions that are personal or specific to
25 a person's transgender experience, unless they want to

1 talk about it. If a person gets uncomfortable, don't - -
2 - don't push them, in talking about it, to say more.

3 And then consider the potential impact of
4 transphobia on a case. So these are just some examples,
5 but there's a lot more, some of which we're going to talk
6 about in a minute: So in unemployment cases, think about
7 did the litigant suffer discrimination or inability to
8 find employment because of their transgender. Or in
9 thinking about a - - - person's criminal history, maybe
10 they were arrested for using the wrong bathroom, which is
11 actually something that happens all the time, or using the
12 bathroom that doesn't match their gender identity, or not
13 having identification. Petty theft for clothes, cosmetics
14 or prostitution could also be related to somebody's
15 transgender identity or not being able to affirm their
16 identity. Thinking about family ties and the ways in
17 which transgender people often don't have close family or
18 parent or child relationships with their biological
19 families when they're transgender, because the
20 relationship sometimes becomes really complicated, and
21 then thinking about histories of violence and harassment,
22 how might discrimination have affected the case that's
23 happening.

24 And then the last thing we just want to - - - I
25 just want to talk about is considering the impact of

1 transphobia in society. So, just, examples of this are,
2 like, if a person's safety waiver is denied, will
3 publication of their name change out them, will that draw
4 attention to where they live, will somebody be more likely
5 to commit hate violence against them because of that, will
6 the denial of bail result in jail conditions that - - -
7 disproportionately harm transgender defendants, meaning
8 that trans people are really vulnerable to rape and
9 assault inside prison and jails, and will that also
10 unfairly coerce the defendant to take a plea.

11 And then just considering the impact or conduct
12 of disposition on transphobia. So every action we as
13 lawyers and judges take to reduce transphobia makes a
14 really big difference. Some examples are just that every
15 name-change decision reduces transphobia by allowing a
16 person to obtain ID that corresponds with their gender
17 expression. And every time a judge or attorney uses a
18 name or pronoun that matches a person's gender identity
19 and expression, it creates more trust and investment just
20 in this legal system itself.

21 So with that, I'm going to turn it over to
22 talking about name-change court specifically.

23 JUDGE MOULTON: Thank you, Ms. Gehi.

24 Let me cue up the - - - oh, we have a little
25 feedback. Sorry. Let me cue up the PowerPoint.

1 The next portion of the program will concern
2 issues facing transgender petitions - - - petitioners in
3 name-change proceedings. As you know, I'm Peter Moulton,
4 supervising judge of civil court; I told you that already.
5 But I'm joined by Megan Stuart, a staff attorney at the
6 Peter Cicchino Youth Project at the Urban Justice Center.
7 The Peter Cicchino Youth Project focuses on providing
8 civil legal services to homeless, lesbian, gay, bisexual,
9 transgender and questioning youth in New York City.

10 Just give me a moment.

11 Okay. During the course of this program, we
12 will be hearing from lawyers who regularly advocate for
13 transgender people. In addition to participating in the
14 discussion about how we can ensure that courts are
15 welcoming and bias-free places for transgender people,
16 these lawyers may express points of view with respect to
17 particular court proceedings that not all judges agree
18 with. This program is designed in part to open up a
19 dialogue concerning the best practices in such
20 proceedings.

21 I'll now turn it over to Megan.

22 MEGAN STUART: Thank you. So the basic
23 assumption of this series is that all people have the
24 right to live and express their gender without fear of
25 violence and discrimination, and that includes being able

1 to access the court.

2 So, before we go into what the name-change law
3 says, it used to be in common law you could just change
4 your name; you could show up and say, hi, instead of being
5 Megan, I'm now known as Peter Moulton, and it would - - -
6 that's just how it worked. Then they codified that
7 common-law right, and the name-change statute is
8 incredibly broad to reflect that common-law history.

9 So the way name changes work, after a judge
10 issues an order in the - - - oh my.

11 JUDGE MOULTON: See if I can turn off the other
12 microphone. No.

13 MEGAN STUART: In the - - -

14 JUDGE MOULTON: Okay. We're having technical
15 difficulties.

16 MEGAN STUART: So the - - - a name-change order
17 is required now to update your name at every government
18 agency; it's the key to having a piece of ID with
19 affirming name. And having identi - - - I - - - ID with
20 the right name gives people access to jobs and social
21 spaces that they might not otherwise have access to if
22 they'd have to show an ID and be outed every time they
23 have to show it.

24 There's a list of other ways that a legal name
25 change can help, but I think a good example is with the

1 Social Security Administration. To change your name with
2 Social Security, you have to bring a name-change order, an
3 application and proof of your identity, in person. They
4 verify that you are who you say you are, they take the
5 court order, and then they update your name; your Social
6 Security number remains the same. And it's important to
7 note that the name changes don't entitle people to update
8 their gender marker at any government agency; to do that,
9 usually it requires a doctor's letter outlining various
10 medical procedures.

11 JUDGE MOULTON: Okay, name-change proceedings
12 are governed by Sections 60 through 65 of the Civil Rights
13 Law, and I'm just going to run through those requirements.
14 The required contents of petitions of name-change
15 applications are set forth in Section 61 of the Civil
16 Rights Law. The form petitions that we use in New York
17 City guide petitioners through the matters that must be
18 addressed in a petition.

19 To summarize, Section 61 requires that the
20 petitioner state her current name, date of birth, place of
21 birth, age and residence, and the name which she proposes
22 to assume. The petitioner must also provide information
23 on eight questions set forth in Subsection 1 of Section
24 61; these are: whether or not the petitioner has ever
25 been convicted of a crime or adjudicated a (sic) bankrupt;

1 whether there are any judgments or liens of record against
2 the petitioner; and the remaining six questions concern
3 whether the petitioner has any outstanding child-support
4 or spousal-support obligations, the courts from which ob -
5 - - such obligations emanate, and whether the petitioner
6 is in compliance with those obligations.

7 If the petitioner is currently incarcerated or
8 on probation for certain specified violent felony offenses
9 or certain other felonies specified in Subsection 2 of
10 Section 61, the petition must also specify the felony
11 conviction, the date of the conviction or convictions, and
12 the court or courts in which such convictions were
13 entered. If the petitioner is not currently incarcerated,
14 those requirements don't apply; they just merely must
15 state whether or not they've ever been convicted of a
16 felony.

17 The final requirement in Section 61 is that if
18 you were born in New York State, you must provide a copy
19 of your birth certificate or a certified transcript
20 thereof or a certifi - - - certificate from the
21 appropriate New York State governmental entity saying that
22 no birth certificate is available.

23 Courts have held that the statutory criteria
24 that I just went through are designed to ensure that a
25 name-change petitioner does not seek to perpetrate a fraud

1 or misrepresentation or interfere with the rights of any
2 other person. An example of one of many authorities
3 holding that is Matter of Winn-Ritzenberg, which is
4 26 Misc. 3d 1.

5 Over the years, individual judges have added
6 certain requirements not specifically required by the
7 statute; they have made the implicit or explicit argument
8 that such requirements are necessary to ensure that a name
9 change does not perpetrate a fraud or misrepresentation or
10 interfere with someone else's rights. For - - - for
11 transgender people, one hurdle that certain courts used to
12 require was medical documentation of sexual reassignment
13 surgery or some other medical procedure or diagnosis that
14 the petitioner had taken affirmative steps to change her
15 gender. There's no such requirement in the statute. And
16 now there's appellate authority striking down the
17 imposition of any such requirements. That - - - one
18 authority for that, per opposition again, is the case of
19 Winn-Ritzenberg, which is cited here in the PowerPoint,
20 and also I've already cited it verbally.

21 Some judges have also required documentation of
22 a petitioner's criminal history, including dispositions,
23 before the judge will order a name change. That's not
24 required by the language of the statute, which provides
25 that petitioners must state whether they've been convicted

1 of a crime. As I said before, there is a prior-notice
2 requirement for some people who were incarcerated for
3 certain felony offenses.

4 An incarcerated petitioner who has been
5 convicted of those certain felony offenses is required,
6 under Section 62 of the Civil Rights Law, to give prior
7 notice of the hearing of the petitioner to the district
8 attorney of every county where the petitioner has been
9 convicted of such felony, and every court in which such
10 felony conviction occurred. Unless the court specifies
11 otherwise, the notice must be no less than sixty days.
12 Now, I've been a judge for ten years; I don't think I've
13 ever had a name-change petition from an incarcerated
14 person, but they do happen.

15 Meg - - - Ms. Stuart?

16 Judges sometimes require that the information
17 concerning - - - that they want this information
18 concerning criminal dispositions. Does that pose a
19 problem for transgender people?

20 MEGAN STUART: It often can. Like Elana was
21 talking about on day one, and Pooja just recapped, because
22 of the cycles of poverty and criminalization, a lot of our
23 trans clients are either profiled as sex workers and have
24 a lot of arrests for prostitution, or engaged in survival
25 sex. There also is an issue with some of our clients if

1 they've been trafficked for the purposes of commercial sex
2 work; they'll also have many arrests for prostitution and
3 other related crimes. It can also be really burdensome to
4 get dispositions. You have to go to each criminal
5 courthouse in each borough, and sometimes it can cost ten
6 dollars per disposition.

7 JUDGE MOULTON: Of - - - of course the judge has
8 the right - - - and I think every judge does this - - - to
9 require the petitioner, after the order's been signed, to
10 notify the New York Division of Criminal Justice Services
11 that the name change has been granted. Virtually all
12 judges I've spoken with about that question state that
13 they require this post-order notice in cases where people
14 have had some brush with the criminal-justice system.
15 That doesn't pose any problem for a name-change applicant
16 that you can think of, does it?

17 MEGAN STUART: No. And sometimes that's best,
18 because if we're requesting people's criminal history, we
19 really want to see their entire criminal history. So it's
20 in the person's interest to have their names linked, most
21 of the time.

22 JUDGE MOULTON: Okay, birth certificates;
23 they're also mentioned in the statute. If you were born
24 in New York State, the statute requires that you provide
25 an original birth certificate with the petition. There's

1 no requirement that the petitioner provide a copy of its
2 out-of - - - of his out-of-state birth certificate.

3 However, I know that I like to see a copy of an out-of-
4 state birth certificate in the court file; it provides
5 some kind of foundational document that provides some
6 proof that the person before me is who they say they are.

7 Ms. Stuart, what problems, if any, are there
8 with providing such a copy?

9 MEGAN STUART: I mean, for some people, there -
10 - - it's not just as easy as calling up a parent and say,
11 "Hey, mom, please send me my birth certificate," due to
12 family violence and rejection. Can also be very expensive
13 to get replacement birth certificates; it's forty dollars,
14 for example, to get one from Wisconsin. And some people,
15 like asylum seekers, are people who have asylum, which is,
16 you know, they've asked the - - - Immigration to stay in
17 this country for fear of return, based on past
18 persecution, can't get their original birth certificates
19 without the risk of losing their immigration benefit.

20 JUDGE MOULTON: What about other types of
21 identification? Because judges, again, like to have some
22 documentary evidence that petitioners are who they say
23 they are. So, of course the statute requires out-of-state
24 people just to swear that they say - - - that they are who
25 they say they are. Nonetheless, some kinds of

1 identification cards can provide some proof of identity
2 and give a judge some amount of comfort level. Does that
3 pose any problem?

4 MEGAN STUART: It can. Not everyone keeps an ID
5 with the wrong name and gender marker, so they just don't
6 have it. Also, a lot of the studies that have come out
7 recently in relation to the rolling back of the Voting
8 Rights Act have shown that low-income people generally
9 don't have access to photo ID. And I think it's also
10 important to remember that name-change proceedings are
11 regular civil proceedings under the CPLR and that the
12 foundation of those proceedings is a sworn verification.
13 Like, when I practice in housing court, the judges cannot
14 on their own to - - - ask the petitioning landlord, "Are
15 you really the landlord? Are you really entitled to this
16 rent?" I don't know why these proceedings would
17 necessarily have to be different in that way.

18 JUDGE MOULTON: Okay. Now, finally, judges not
19 infrequently seek to verify a petitioner's - - -
20 petitioner's immigration status. The Civil Rights Law
21 does not require any statement by a petitioner of her
22 citizenship or immigration status; it does ask for
23 residence, but that is all. Some authority that holds
24 that it's not necessary to state immigration status is the
25 case of Madam - - - Matter of Novogorodskaya - - - it's

1 easier to remember the cite for that name - - -
2 104 Misc. 2d 1006, and Matter of Lifschutz (ph.), which is
3 178 Misc. 113, and I didn't leave off the number; that is,
4 I think, a 1940s case.

5 There is contrary authority, however. There are
6 at least two published decisions where courts have denied
7 name changes where immigration status was unclear. In
8 Matter of Boquin, 24 Misc. 3d 473, and Matter of Mohomed,
9 3 Misc. 3d 402, courts denied name-change petitions,
10 insisting that a petitioner state his immigration status
11 and intent to remain in the United States. Again, these
12 requirements do not appear in the statute. The
13 legislature has amended Article 6 of the Civil Rights Law
14 since the decisions in Boquin and Mohomed, and has not
15 adopted the reasoning of those decisions by amending the
16 statute.

17 Would you like to speak to that issue?

18 MEGAN STUART: Yeah. So, generally, after a
19 judge reviews the petition, a petitioner - - - a name-
20 change petitioner is ordered to publish a legal notice of
21 their name change, in a newspaper certified in that
22 county. And what's published is the index number, the
23 petitioner's old and new name - - -

24 JUDGE MOULTON: I'm sorry; I was unclear. I
25 meant to say did you - - -

1 MEGAN STUART: Oh, about the immigration.

2 JUDGE MOULTON: - - - want to talk about
3 immigration status.

4 MEGAN STUART: No; I think you covered it.

5 JUDGE MOULTON: Okay. That's fine.

6 MEGAN STUART: So I (indiscernible).

7 JUDGE MOULTON: Let's move on to publication.

8 MEGAN STUART: I apologize.

9 JUDGE MOULTON: Okay. We have a lot to cover
10 today, so - - -

11 If a name-change petition is granted, then
12 Section 63 of the Civil Rights Law directs publication in
13 a designated newspaper. Publication can be waived under
14 Section 64(a) in cases where there is some threat to
15 personal safety.

16 So, take it away.

17 MEGAN STUART: Sorry. So what's published in
18 the newspaper is the petitioner's old and new name, the
19 index number, the courthouse, the petitioner's address,
20 and the petitioner's place and date of birth. Given all
21 of this information that's publicly available, it's - - -
22 to think for our clients what is personal safety, what
23 does that mean. And as Elana talked about in the first
24 day, study after study shows that trans people, especially
25 trans women of color, are disproportionately victims of

1 violence, and type of violence that they often face is
2 rage, street violence, and family rejection. And given
3 all of these studies, to think about personal safety, it's
4 not just necessarily that there's one particular
5 perpetrator who's trying to victimize someone, but there's
6 this generalized risk of violence and that, on that basis,
7 publication can be waived. The Matter of E.P.L. in
8 Westchester held that very thing; - - - they said
9 publication could be waived for the petitioner's personal
10 safety, because of this generalized risk of violence that
11 he would suffer as a trans person.

12 And so then the question is, if a judge doesn't
13 feel comfortable waiving publication, what can be done to
14 reduce this harm. And something that some judges do is
15 not have the petitioner's address in the notice. I think
16 there could be not having both names, because that's
17 really what outs someone as trans.

18 It's also really expensive to publish; it's 35
19 dollars to publish in the cheapest newspaper, but it's 250
20 dollars to publish in, like, the New York Post.

21 JUDGE MOULTON: Okay. The civil-rights statute
22 does not provide that the public should be excluded from
23 name-change proceedings, but there are some steps that
24 judges and court personnel can take to ensure that
25 transgender name-change petitioners feel comfortable in

1 court. Just to set the stage, I think it varies from
2 county to county, but many counties are like New York
3 County in that the name-change proceedings occur in a
4 large courtroom. Approximately fifteen to twenty-five
5 petitions are heard in a given morning. Civil-court
6 judges do vary in how they review the petitions. Some
7 judges want to speak to each petitioner; of these, some
8 judges speak quietly with the petitioners at the bench.
9 Others ask that the petitioners sit at counsel table,
10 which generally leads to questions and answers that can be
11 heard from everyone in the courtroom. Still, other judges
12 seldom speak to petitioners and instead primarily rely on
13 the contents of the petitions. These judges speak only to
14 the petitioners whose petitions raise an open question.

15 So, Megan, in that kind of courtroom, how do you
16 - - - like, what do you think are the best practices?

17 JUDGE MOULTON: I think the - - - this is
18 something Pooja talked about earlier; but not calling
19 someone by their old name. There's no legal reason that,
20 even if a judge were to deny a name change, that you
21 couldn't still call the petitioner up by their new name;
22 and that's both for the judge, the court attorney and the
23 court staff, because it can be very uncomfortable when
24 you're sitting in court with someone who presents and is
25 read as female and then, you know, "John Doe" is called

1 out and everyone turns their head and looks and sees this
2 person. She's immediately outed in that moment and it can
3 be very uncomfortable and potentially dangerous.

4 Also, titles - - - gender titles like "mister"
5 and "miss", even though generally they're done out of
6 respect, if you don't know the person's gender preference,
7 just to say "petitioner" or just call them by their last
8 name.

9 Also, as Judge Moulton said, not all counties
10 have hearings. When we do upstate name changes, and even
11 on Long Island, it's often done on the papers. And so the
12 things in the petition that can potentially out someone,
13 like their old and their new name, the reason for changing
14 their name, and any safety-publication waiver they might
15 request, isn't necessarily talked about in an open
16 courtroom.

17 But in New York, as Judge Moulton said, you
18 know, there's a whole room and, if it's possible, if a
19 judge needs to speak to a petitioner, to do it at the
20 bench when you're asking for clarifying questions, just
21 so, again, the whole courtroom doesn't know that this
22 person is trans and they're not outed in all of these
23 ways.

24 And also, as Pooja talked about, you know, think
25 about why are we asking these questions of petitioners.

1 We ask a question about their criminal history that's sort
2 of outside of issues of fraud or the statute; is that
3 going to trigger some kind of trauma, is that going to out
4 them in some way. And just to be aware of every question
5 has that potential, and just to think quickly, you know,
6 do I need to know this. There are many things that judges
7 do need to know but, if you wouldn't ask a nontrans
8 petitioner the same question, I think it would be
9 important to think about that.

10 JUDGE MOULTON: Okay. We now have some time for
11 question-and-answer. If anyone in the audience would like
12 to pose a question to myself or to Ms. Stuart, please let
13 us know. We have a microphone.

14 It looks like we answered everyone's questions.

15 Ah. There's one question in the front row.

16 UNIDENTIFIED SPEAKER: This may not really
17 relate to this program; but just in general, there is a
18 concern about - - - with name changes, with fraud. But to
19 - - - the fraud is really based on what the person
20 divulges. There's no checks, I don't think, done by civil
21 court to make sure someone wasn't bankrupt. So why do we
22 require anything? If the court itself is not going to make
23 sure that what is stated is true, I'm not really sure why
24 anything is required.

25 JUDGE MOULTON: Well, the statute says it's

1 required, as we all - - - all the lawyers in the room are
2 shaking their heads, so we know that. But it is - - - it
3 is a weakness of name-change proceedings. I agree with
4 you that there's not going to be a great deal of inquiry.
5 It's - - - it's sort of a due diligence at a rather low
6 level. Does that answer - - - I mean, it's not really - -
7 -

8 UNIDENTIFIED SPEAKER: Yeah, I mean, I've always
9 wondered - - -

10 JUDGE MOULTON: - - - an answer to your
11 question. I agree with your comment.

12 UNIDENTIFIED SPEAKER: - - - because the due
13 diligence is based on what the person divulges, so you're
14 accepting that they are saying what is - - - whatever the
15 truth is, and the - - -

16 JUDGE MOULTON: Um-hum.

17 UNIDENTIFIED SPEAKER: - - - court system itself
18 does no checks on this. So - - -

19 JUDGE MOULTON: But we rely on that in so many
20 ways, as - - - as Ms. Stuart said and as - - -

21 UNIDENTIFIED SPEAKER: Okay.

22 JUDGE MOULTON: - - - Ms. Gehi said. I mean, I
23 - - - I think that you're right; it can be a weakness.
24 But people - - - you know, we hope people don't commit
25 perjury; they do, of course. But we rely on that in the

1 court system, I think, in so many ways.

2 MEGAN STUART: And also, I think these days so
3 little is really tied to our names. You know, so much is
4 connected to our Social Security numbers and our credit
5 histories. So even if you change your name, you're not
6 really - - - I think it's very difficult to escape a
7 creditor, with a new name. But you still have a Social
8 Security number, your credit history. The reporting
9 bureau is your bank. You have to update your name at all
10 of these places and, to do that, you have to establish
11 your identity. So in some ways, the name-change order is
12 useless on its own; it doesn't actually do much for
13 people, except it's the key to updating their name
14 everywhere else.

15 JUDGE MOULTON: Yes, we have another question.

16 UNIDENTIFIED SPEAKER: What advice would you
17 have for practitioners who get a judge who does request
18 information that you feel isn't appropriate to ask or
19 isn't necessary for the determination of the name-change
20 application? What recourse would you have once you get
21 that request either - - - you know, sent out from the
22 judge?

23 MEGAN STUART: You can - - - if it - - - you can
24 always, you know, ask for a brief oral argument. But a
25 denial can be denied - - - can be appealed to the term, if

1 you get a written denial on that. And you can - - - you
2 know, most judges in civil court are very smart and well
3 acquainted with the law, so just having a conversation can
4 often get everyone on the same page. And maybe, as a
5 lawyer, you can find out what the actual concern is and
6 can it be addressed in another way without maybe having to
7 get something that's well outside of the statute.

8 JUDGE MOULTON: I find that practitioners who
9 come into court are often very well prepared with
10 authorities, so they actually sometimes hold up cases to
11 me. It's more difficult when it's a pro se, because that
12 person's not going to be armed with recent decisions, of
13 course.

14 Next question?

15 UNIDENTIFIED SPEAKER: Judge Moulton, you
16 mentioned conflicting authority as to whether a judge can
17 request one's immigration status. Since the whole purpose
18 of a name-change petition is to ensure that a fraud is not
19 being committed - - - in fact that's the o - - - that's
20 the only inquiry that the court ultimately has to decide -
21 - - and in light of the statute's specific requirement
22 solely of residence, do you have any idea what would be
23 the rationale for a court wondering one's immigration
24 status?

25 JUDGE MOULTON: Thank you for that question. I

1 - - - I disagree with the authority that requires some
2 statement of immigration status, and I actually - - - I
3 wrote a decision, which wasn't published, in which I
4 declined to follow those - - - those. So I'm probably the
5 wrong person to ask to defend those decisions.

6 It is a - - - I think you're right; it's a - - -
7 it is a requirement that shouldn't be placed on - - - on
8 any name-change applicant.

9 MEGAN STUART: And there's a lot of other
10 authority that makes clear that immigrants - - -
11 regardless of immigration status shouldn't be denied
12 access to the court. And fraud in this context is
13 actually not well defined in any of the case law. A lot
14 of the courts turn to Black's Law Dictionary, which is a
15 very specific type of - - - you know, financial fraud
16 against a person. And so these larger concerns that some
17 judges have about terrorism, post-9/11, which a lot of the
18 contrary authority were from people who were Middle
19 Eastern, trying to anglicize their names - - - that's what
20 I think, at least, one of the Westchester cases was - - -
21 I think that fear's really rooted in - - - I don't want to
22 say "racism", but I think it's oftentimes racism rather
23 than an actual fear of fraud.

24 And Immigration has their own check system; it's
25 - - - you know, like, we have Social Security numbers.

1 Most immigrants who are - - - have been known at some time
2 to Immigration, whether or not they currently have lawful
3 status, have sort of an immigration equivalent of a Social
4 Security number. So again, it's not that you can change
5 your name and all of a sudden you can fly under
6 Immigration's radar.

7 JUDGE MOULTON: Also remember that post-order,
8 as well, after the order's been signed every judge I know
9 who does name-change proceedings requires that there be
10 notification of the name change to the - - - not the
11 Immigration and Naturalization. What's it's called now,
12 the INS?

13 MEGAN STUART: The USCIS.

14 JUDGE MOULTON: Yeah, USCIS.

15 So I think we probably need to move on to the
16 next part of the program, so I'm going to now queue up the
17 next PowerPoint. And so the next part, - - - the
18 participants are going to introduce themselves. And it's
19 about family court. Thank you very much.

20 JUDGE HEPNER: Good afternoon. My name is Paula
21 Hepner, and I'm a retired judge of the family court and
22 formerly the supervising judge for Brooklyn Family Court.
23 I'm joined today on my right by Kim Forte from The Legal
24 Aid Society, and by Elana Redfield on my left, from the
25 Sylvia Rivera Law Project. And we are here to talk about

1 some of the ways that transgender people will be bringing
2 cases in family court, and some of the issues that will be
3 confronting us.

4 The goals of our training, as you can see on the
5 slide, are to acknowledge first of all that families are
6 now defined beyond biology. Second, we are recognizing,
7 in our practice, real-life scenarios of transgender
8 parents and children. And third, we want to explain ideas
9 of what is in the best interest of the children.

10 What you will be seeing in the next remaining
11 part of the program are three scenarios, three different
12 fact patterns, which will be presented by us, with a
13 discussion following of the issues that we think these
14 fact patterns raise. So we will begin with the first one,
15 which involves a couple, Erica and Allison, formerly known
16 as Michael.

17 ERICA (BY ELANA REDFIELD): Hi. I'm Erica. So
18 Michael and I were married six years ago. We have two
19 children: Amy who's eight, and Steven who is five. We
20 divorced two years ago. I got custody of the children,
21 and Michael received visitation on alternate weekends,
22 including Mondays if his weekends fall on a holiday.
23 Michael also has alternating school vacations and one
24 month in the summer.

25 ALLISON (BY KIMBERLY FORTE): Hi. My name is

1 Allison. I'm formerly known as Michael. Six weeks ago
2 during a weekend visit, I told my children that I now
3 identify as a woman, that I will be dressing as a woman
4 and that I'll be using the name Alison. I've also been
5 dating another woman, and her name is Pamela.

6 ERICA (BY ELANA REDFIELD): So the children told
7 me about this right away, and I immediately filed a
8 petition to modify our existing custody agreement,
9 including Michael's visitation. I asked the court to make
10 an order permitting Michael to visit only if his parents -
11 - - if his visits were supervised by his mother. And I
12 wanted the judge to order Michael to dress as a man during
13 visits and to refer to himself as Michael only, when
14 speaking to the children. Also, I really don't want
15 Pamela to be around the children.

16 ALLISON (BY KIMBERLY FORTE): The judge didn't
17 change my visitation after Erica filed her modification
18 petition. But three months later, I was fired from my job
19 because of my transition and how I was expressing my
20 gender. I had to pay for my health care out of pocket,
21 because my health-insurance company doesn't pay for any
22 transitional medical care. So I relied on my salary to
23 pay my rent. And when I lost my job, I couldn't afford my
24 apartment any longer, and so I've been living with friends
25 who have allowed me to stay with them.

1 ERICA (BY ELANA REDFIELD): Right. So, given
2 the change that Michael just told you about, I filed for
3 another modification because my children can't visit if
4 they have nowhere to sleep.

5 ALLISON (BY KIMBERLY FORTE): I realize that
6 living with friends is not a long-term solution, and I've
7 been thinking I may need to enter a shelter so that I can
8 continue to see my children. But Pamela has offered for
9 me to move in with her, and I do think our relationship is
10 going to be permanent.

11 JUDGE HEPNER: So now we want to talk about the
12 issues raised by this scenario. Children's acceptance of
13 transgender parents.

14 KIMBERLY FORTE: So in the research it shows
15 that young people in fact do accept their parents'
16 transition. Age may affect that. Older adolescents do
17 struggle a little bit more than younger children in
18 accepting of parents. But we're not seeing in the studies
19 high rejections of - - - by children, of their transgender
20 parents.

21 And I - - - you know, I would argue today that -
22 - - well, not argue. A lawyer. Sorry; it's my role.
23 But, you know, I would - - - I would say to you that
24 really our role in family-court practice is to assist
25 children in accepting their parents and their current

1 situations.

2 JUDGE HEPNER: CLE code for this program is
3 7215. 7215.

4 KIMBERLY FORTE: And so that's really what we
5 should be focusing on is how to assist these children, who
6 are party of this case, in acceptance, and working with
7 professionals whose role - - - who - - - who have
8 histories and cultural competency in working with young
9 people on acceptance of transgender adults, and also even
10 their own acceptance and parents' acceptance of that.
11 There is a program called Gender Spectrum right here in
12 New York City, and other programs that have incredible
13 cultural competency to work on these issues.

14 You know, the outside discrimination can really
15 harm the young people in - - - involved in this family,
16 particularly in this case -- a little bit of Erica's --
17 and how people - - - reaction to Allison and outside
18 discrimination, that being the employer of Allison. There
19 - - - what we see in studies is that, unfortunately,
20 transgender people have a significant amount of
21 underemployment. We've talked about the poverty of - - -
22 the cycles of poverty; I won't focus too much on that,
23 given the - - - the history of this - - - these
24 presentations. But we do in fact see a lot of
25 discrimination in employment against the transgender

1 community, and a lot of people unfortunately losing
2 housing, losing benefits and losing stability because of
3 discrimination based on their gender identity.

4 There is really two distinct things going on
5 here for these young - - - for the children in the family
6 and - - - and for the two adults in the family, one being
7 Allison's transition, and the second being Allison's
8 sexual orientation and attraction to Pamela. I think many
9 people would look at this scenario and think, well, if she
10 - - - if Allison is still with a woman, why did she ever
11 transition. And what we really have to focus on is
12 Allison is being honest about who she is and that she is a
13 woman and that she is now in - - - in a relationship and
14 identifies as a lesbian and that that - - - that her
15 sexual orientation and her gender identity are two very
16 separate things, the children will see them as separate
17 things, and that in - - - in addition to the fact that
18 we're not seeing high rejection of parents - - - by
19 children, of their transgender parents, we're also not
20 seeing any sort of negative effects of children being
21 raised in same-sex households. The research just shows
22 that there really is no effect; children aren't more
23 likely to be transgender or more likely to be gay if
24 they're raised by transgender adults or if they're raised
25 in same-sex relationships.

JUDGE HEPNER: There are a few other issues that come up before judges who have to analyze these problems and these circumstances as they come before them. And so if we were going to talk about what would form the analysis or inform the analysis that a judge would make in this case, certainly clearly in addition to all the factors that we go through involving finances and education and who's looking out for the child's best interests, we factor in and look at the fact that we've had children visiting with a father, an established routine here for two years. This person they've known as their father, they are now going to have to adapt; they're going to need help to adapt to their father's new identity and understand what has happened, how it's happened, and go forward from there. We need to think about how the information was communicated by Allison to the children and was it done with any supports, for example, outside assistance from professionals, if not at the very beginning; did the children - - - are the children going to be offered additional supports and help to make this understanding in their own mind of what has happened and to understand their feelings about this parent; how are the children processing the information now and over time, because those feelings and those processes will in - - - indefinite - - - absolutely change; what reaction are the

1 children having. All of these are factors that need to be
2 considered, along with what is Allison's level of
3 sensitivity to the range of emotions that the children
4 will feel. None of these are barriers; these are
5 questions that go to this application to change custody.

6 We also have an issue of a modification petition
7 here, and the - - - the factors that go into that are,
8 what is reasonable under the circumstances, given
9 Allison's financial concerns, her issues. She recognizes
10 the children need a more permanent place to have
11 visitation, something that's more stable than living from
12 friend to friend. We have many families in the family
13 court who are having visitation living in shelters. We
14 certainly don't want to suggest that if Allison were to go
15 into a shelter, as she said, that she would be viewed any
16 differently than any other parent of children in shelters.

17 We have issues about have the children met
18 Pamela before, what's their relationship to Pamela, what's
19 Allison's plan for introducing Pamela to the children if
20 they haven't met her.

21 And so as we look at this new constellation of
22 family, it raises a whole group of other issues.

23 We're going to go to our second scenario, and
24 this scenario has three players: David, Jennie and
25 Hector. And we'll start with David. I'm David.

1 DAVID (BY JUDGE HEPNER): I got involved with
2 Jennie and we were together for a few months, but we never
3 lived together or anything. When she told me she was
4 pregnant, I was zero to sixty in nine seconds, out of
5 here.

6 JENNIE (BY ELANA REDFIELD): Hi. I'm Jennie.
7 So after David took off, I met Hector and we began to have
8 a relationship. I was in my third month. By the time I
9 was in my sixth month, Hector and I began living together.
10 Shortly before my baby Maddie was born, Hector and I got
11 married.

12 HECTOR (BY KIMBERLY FORTE): Hi. I'm Hector.
13 When I was born, I was assigned a female gender at birth
14 and was given a female name. I've identified as a man as
15 long as I can remember. Before I met Jennie, I medically
16 transitioned, I had a legal name change, and now all my
17 IDs in - - - indicate a gender marker of male. I have
18 lived with Maddie since she was born, and she calls me
19 Daddy. Her birth certificate says that I'm Maddie's
20 father.

21 JENNIE (BY ELANA REDFIELD): So David has had no
22 contact with me ever since he left, and he has not gotten
23 in touch with me to find out about the baby, how she's
24 doing. He's never seen Maddie and he's never had any
25 contact with her.

1 DAVID (BY JUDGE HEPNER): Well, it took me a
2 while to find her. You know, I didn't have any idea where
3 she moved after we broke up. I finally tracked her and
4 the baby down and I found out what's up with them and,
5 once I did, I ran into court and I filed for paternity and
6 custody, because I just don't think Maddie's safe with
7 them. I don't think Maddie's safe with Jennie and Hector
8 in that house.

9 JENNIE (BY ELANA REDFIELD): When I was served
10 with petitions for paternity and custody, I cross-filed
11 for an order of protection because David is constantly
12 calling me and coming around and threatening me and Hector
13 in front of Maddie, who's now two years old. I also moved
14 to dismiss David's paternity petition because Maddie was
15 born during my marriage with Hector, and she's his
16 daughter.

17 DAVID (BY JUDGE HEPNER): Hector can't be a
18 father to any child, because he's a woman. You just can't
19 cut me out of things like that.

20 HECTOR (BY KIMBERLY FORTE): The judge ordered
21 me to be served with a paternity and custody petitions,
22 and I came to court, along with my wife, to assert the
23 presumption of legitimacy and assert an estoppel defense.

24 JUDGE HEPNER: So now we'll turn to what the
25 issues raised here are.

1 ELANA REDFIELD: So one of the questions that
2 comes up here is what does it take to legally change one's
3 gender and is it binding on courts. In New York State
4 there is actually no provision for legally changing your
5 gender, and it's a matter of whether each agency updates
6 your gender. Under New York City law and State law, you
7 are supposed to respect how someone identifies their
8 gender identity, and therefore that is what is dominant in
9 a situation.

10 KIMBERLY FORTE: Many people might look at this
11 scenario and think only sex assigned at birth and assume
12 that the marriage between Jennie and Hector is a same-sex
13 marriage. But in fact, at the time that Jennie and Hector
14 are married, Hector is fully identified as a man, and it
15 was a heterosexual marriage, so the child was born of a
16 heterosexual marriage in this circumstance.

17 You know, would it make a difference - - - I put
18 this question to the panel a little bit: would it make a
19 difference if Hector had only socially transitioned and
20 did not have I - - - did not have a legal name change or
21 that did not have gender marker changes on his IDs? I
22 would argue, in - - - in some ways, it changes it a little
23 bit, but does - - - significantly overall it doesn't
24 change it. If that were the case, what we would be
25 looking at is in fact a - - - a same-sex marriage where

1 legally two women were married, even though Hector
2 socially was identifying as a man and had not maybe had
3 those legal documents changed with a name change. And
4 what we know about New York law is that any child born of
5 a marriage is a product of that marriage.

6 So in this case, perhaps Hector's legal name, if
7 it were not Hector at the time, may have gone on the birth
8 certificate after the marriage certificate was served in
9 the hospital to the staff, under parent 1 and parent 2,
10 which is now how it's done after marriage equality passed
11 in New York State. But really, Maddie is still a product
12 of that marriage, and these are two - - - that they would
13 legally be two female parents.

14 JUDGE HEPNER: I think, if we remember back to
15 the first presentation two weeks ago when Elana was
16 talking about the fact that gender - - - having surgery to
17 alter one's gender is not available to everybody, that it
18 is a process that ignores the fact that people have the
19 right to identify on their own who they are, with or
20 without interventions. And I think we were trying to
21 point out two weeks ago that because most people cannot
22 afford these surgeries, if we are going to go the
23 direction of only recognizing Hector and Jennie's
24 relationship as a lesbian relationship, then we have cut
25 out a certain group of people from legal recognition of

1 their relationships.

2 And I think, if you recall two weeks ago, Elana
3 was talking about doctors affirming the success of a
4 gender transition based only on appropriate clinical
5 treatment rather than moving in the direction of
6 surgeries, I think we then see that we can be more
7 equitable and more affirming to everybody who comes before
8 us. And this shift in our focus away from medical
9 intervention to how one is going to identify themselves to
10 the world and be respectful of that is the direction that
11 we want to move in order to be affirming to the people who
12 come before us.

13 And as Kim just said, in a paternity case,
14 either as a legal marriage of different-gendered people or
15 as a legal marriage of same-gendered people, the issue
16 here for this case is the presumption of legitimacy, and
17 the issue here is an estoppel. It seems to me David
18 either has to overcome the presumption and defeat an
19 estoppel argument to become a dad, or he simply has to
20 proceed on his custody position as a legal stranger to
21 Maddie.

22 These issues about paternity are getting very
23 dicey in the courts, and I think, in part, it's because
24 we're calling them paternity proceedings rather than
25 parentage. We now are moving away from biology as a

1 determinant factor, and looking at the functions of people
2 and what roles people are playing in a child's life, who
3 loves a child, who does a child love, who expresses
4 affection for -- who does the child give affection to.
5 These are the issues that are of critical importance. And
6 when we start talking about parentage, we get away from
7 the biology that we have been living with in a
8 heterosexist world for many, many years.

9 KIMBERLY FORTE: And speaking from the
10 perspective of a - - - a children's rights attorney, which
11 I have been for many years, from the perspective of
12 Maddie, Hector is her father, right? And so when we think
13 about estoppel and we think about how that attaches to the
14 child's relationships, this is who raised her, this is who
15 was there in her home at the time of her birth, who has
16 been raising her the whole time and been caring for her.
17 And so from the perspective of her being a party to this
18 case, that is certainly what I and, I think, most if not
19 all of my colleagues would be fighting for: the
20 recognition that Hector here is - - - is the father of the
21 child and that - - - to stop any - - - any of David's
22 efforts to - - - to take that away from him.

23 So, we're ready to move on to 3?

24 JUDGE HEPNER: Okay. So we'll now go to the
25 third scenario, which also has three characters: Jessie,

1 Peter and Ellie.

2 JESSIE (BY ELANA REDFIELD): So Peter and Ellie
3 are my dad and mom. I was given the name of Justin - - -
4 don't tell anyone - - - when I was born. Since I was
5 four, I began telling my parents I'm a girl, and I asked
6 them to call me Jessie. My dad is okay with it, but my
7 mom just goes nuts. Recently I asked if I could begin
8 taking hormone blockers and dress like a girl in school.
9 I'm getting really anxious about getting older and things
10 changing, and I really want to make sure that I can live
11 my life as a woman. I also want to get my name legally
12 changed. My dad says okay, but not my mom.

13 PETER (BY KIMBERLY FORTE): Hi. I'm Jessie's
14 father, Peter. I've always been supportive of Jessie's
15 gender identity by us - - - and been comfortable with her
16 using her preferred name and pronoun, and allowing her to
17 wear feminine clothing inside and outside of my house when
18 she stays with me. Ellie always tells Jessie to keep it
19 in the family and not to tell anyone; She refers to Jessie
20 as "my son", calls her Justin, and uses the pronoun "he"
21 when talking about her. Her inability - - - Ellie's
22 inability to accept Jessie is one of the reasons I wanted
23 to separate and leave.

24 ELLIE (BY JUDGE HEPNER): Yeah, well, Peter and
25 I were married for seventeen years, but after we split up

1 we got a separation agreement and I got primary physical
2 custody of our fourteen-year-old child, Justin. Peter
3 sees Justin on Wednesday night for dinner and three
4 weekends a month.

5 PETER (BY KIMBERLY FORTE): After everything
6 that's been going on with Jessie, I filed a modif - - - to
7 modify our separation agreement, stating the change in
8 circumstances and asking for physical custody of Jessie.
9 I want to have a - - - the judge order, as a condition of
10 any visits with Ellie, that - - - or any - - - any visits
11 Ellie has with Jessie, that she undergo therapy and
12 understand Jessie's transition and Jessie's identity.

13 ELLIE (BY JUDGE HEPNER): That's just
14 ridiculous. When I realized Peter would let Justin do all
15 of these things, I cross-filed for a modification asking
16 to have his visits suspended or estopped with Justin or
17 else changed to supervised visits, because he's just not
18 acting in the best interests of our son. Justin is just
19 not old enough to decide anything like this. That's my
20 job. After all, I'm the parent here and I know what's
21 best for my child.

22 KIMBERLY FORTE: So what are we seeing in this
23 scenario? Recently the DSM-5 was issued, the Diagnostic
24 Statistical Manual for Mental Health Disorders - - - I
25 think I got that right - - - and in it there's a diagnosis

1 of gender dysphoria. It was previously known in the DSM-4
2 as gender-identity disorder, but there is a diagnosis of
3 gender dysphoria in children.

4 And what the diagnosis says is that it is a
5 diagnosis of a person who has - - - who does not identify
6 with their sex assigned at birth. It's important for us
7 to note that the word "disorder" was taken out of this
8 diagnosis, and the reason for that is -- is because, I
9 think, medic - - - the medical community and the
10 psychological community have now all agreed that the
11 concept of a disorder was not the appropriate terminology
12 when we were talking about people who identified as
13 transgender or who had gender dysphoria. It wasn't a
14 disorder of them that they identified this way. And so
15 really - - - taking away that disorder was really
16 important.

17 In addition, what the diagnosis now does is it
18 talks about the outside discriminatory factors that really
19 impact young people and adults who are iden - - - who are
20 diagnosed with gender dysphoria, and how a lack of
21 acceptance and how multiple factors of discrimination
22 against them can cause many other issues in their life.
23 And it's not really the concept or the idea of be - - - of
24 having gender dysphoria or identifying as transgender that
25 causes that, but really the outside influence of

1 discrimination and transphobia in our country.

2 And so what do we know about not accepting young
3 people who identify as transgender? We know, by some
4 great work done at an organization called the Family
5 Acceptance Project, and also from some incredible trans
6 advocates across this country, that the - - - that when we
7 do not accept and affirm our young people who identify as
8 transgender - - - and adults for that matter, but
9 significantly in young people - - - their poor outcomes
10 and - - - and - - - and the statistical reality of them
11 engaging in self-harm, their suicide rates, their drug-
12 abuse rates, their exposure to HIV, all of those rates
13 increase exponentially. Like, for example, the statistic
14 for suicidality is 8.9 times more likely than the average
15 American youth. And so we really see some really harsh
16 realities for young people who are not accepted by their
17 parents.

18 What we see is that if that young person is even
19 just slightly accepted by their parents, those numbers
20 come down quite a bit; almost cut in half. And as we go
21 across the continuum to full acceptance of (sic) their
22 parents, what we see is young people who are allowed to
23 identify, either whether that's based on their sexual
24 orientation other than heterosexual or their gender
25 identity that's not their gender - - - that's not their

1 sex assigned at birth, that once parents become very
2 accepting of them, kids have just the same statistical
3 realities of outcomes and treatment and everything,
4 compared to their - - - compared to the average American
5 youth.

6 And so what we know is that it's crucially
7 important that we have adults in young people's lives who
8 are accepting and affirming and allow them to be who they
9 are, and that gives young people the most traject - - -
10 the best trajectory towards success.

11 Finally, my question was, what should we expect
12 from the attorney for the child, because you're likely
13 going to appoint an attorney for the child on this case
14 and they're going to have representation. I would firmly
15 argue, and I think it's been the position of most either
16 institutional offices or individual practitioners who
17 represent young people in family court is that attorneys
18 for children must be culturally competent when they're
19 representing either transgender youth or gay, lesbian and
20 bisexual youth. It is part of our professional
21 responsibility. Our misconduct rule says that we
22 shouldn't discriminate based on, I would argue, gender - -
23 - I know it says "sex", but I - - - I say that it's gender
24 - - - and sexual orientation. And it's really important
25 that we recognize that part of not contributing to

1 misconduct is really educating ourselves and knowing what
2 the current medical, psychiatric standards are in treating
3 transgender youth and that attorneys who come in and have
4 no knowledge of that really need to - - - really should
5 not be representing a young person like Jessie. What we
6 want is somebody who is going to educate themselves,
7 understand what treatment and support looks like for a
8 transgender individual, and the court should be expecting
9 that attorney for the child to really work - - - to really
10 fight on behalf of Jessie's express wishes and really
11 understand that - - - that instead of just substituting
12 their judgment for what they think might be in the best
13 interest of Jessie, that they should be fighting strongly
14 for Jessie to - - - to get further - - - closer and closer
15 to her goals.

16 JUDGE HEPNER: So from the court's perspective,
17 the issues that this scenario raises are - - - require us
18 to take a look at what the custodial options are that we
19 have and how they work in a scenario like this. So our
20 custodial options are typically sole legal and joint
21 custody; they are sole physical custody, shared legal
22 custody, zones of interests, joint legal and physical
23 custody.

24 I think when we start looking at the factors,
25 again, there are certain ones that are very, very

1 important to consider; notably, what parent is in the best
2 position to guide and provide for this child's emotional
3 development. This child is developing on a trajectory
4 different than probably most of the - - - both of these
5 parents had envisioned when they had the child fourteen
6 years ago. And so who is prepared to make this shift in
7 focus, who is prepared to learn about their child, who is
8 prepared to learn about the issues, both emotional and
9 social, for the future, and who's prepared to discuss that
10 and work with the child on those things. That's a very
11 important factor.

12 Again, who is going to provide for the physical
13 needs of the child. This involves medical decision-
14 making. Often judges split up, say one parent'll do the
15 education, another parent'll pick the doctors, another
16 parent'll pick the summer camp, and so on. That's the
17 zone-of-interest custody model. If one is going to
18 consider giving anyone medical decision-making in a case
19 like Jessie, it is of paramount importance who the person
20 is that gets that. So we need to be aware of - - - of the
21 ramifications of who we pick in those terms.

22 Who is going to honor the child's wishes. Who's
23 going to be respectful of the child's statement, "I've
24 known since I was four years old." Who is going to think
25 that that deserves some honor and respect. And how is

1 that going to be played out. Or do we have a parent here
2 - - - and this is another factor we want to look at - - -
3 who is so invested in having this not happen that they are
4 going to be a barrier to the other parent, who is not
5 invested in preventing this, from having a relationship
6 with their child. Who is going to look at the effect that
7 an award of custody to one parent will have on the other
8 parent's relationships; this is a factor we consider in
9 every other case, but in a situation like this it has
10 greater significance in my mind.

11 And then of course, we all know that the chances
12 of appointing a forensic in this scenario are very high, a
13 forensic expert who's going to assist the judge with
14 providing information and helping to make this decision.
15 After all, that's the role of the forensic: to aid the
16 judge. So it seems to me our obligation as judicial
17 officers is to inquire into these individuals before we
18 select them; we inquire into their familiarity with their
19 own codes of ethics. Two weeks ago, if you were here, or
20 if you look at your materials, you'll see that every
21 single discipline we deal with - - - psychiatry,
22 psychology, social work - - - all of them have their own
23 codes of ethics pertaining to the treatment and their work
24 with transgender people.

25 So what are they familiar with? What do they

1 know? What is the degree to which they have done the work
2 themselves on cultural competence, of their own? Have
3 they dealt with their own prior conditioning from when
4 they were kids, what they were raised with? What feelings
5 and assumptions that they have about gender identity,
6 gender expression, transitioning? And are they able to be
7 neutral, as they are supposed to be in this role of
8 forensic, in making some custodial or visitation
9 assessment? These are things we need to explore before we
10 assign these people or appoint them.

11 We need to explore their familiarity with the
12 literature that Kim was just talking about, about
13 parenting by transgender people, and also the literature
14 about children's responses to parents who transition, if
15 we go back to the scenario we had just before with
16 Allison. So is this person conversant with the
17 literature? Does this person really understand what we
18 are learning about children and their adaptability, what
19 we are learning about their ability to process this
20 information, how they make sense out of what's happened to
21 their world, which has gone topsy-turvy in a very short
22 period of time?

23 And finally, we need to explore which parent is
24 best and most familiar and can this - - - this forensic
25 person find out, through their investigation, are they

1 familiar with children making decisions about gender and
2 transitioning on their own, do they have respect for that,
3 or do they, like Ellie, think that they know best, that
4 these children are going through a stage, don't know what
5 they're talking about or they'll change later on. The
6 same - - - the same litany we hear about gay and lesbian
7 kids, we hear about - - - we can hear about in the - - -
8 in the area of tran - - - transgender children.

9 So these are issues to bring up with forensic
10 experts before we hire them.

11 And now we have another issue that Elana would
12 like to talk about.

13 ELANA REDFIELD: Right. So, actually there's
14 two issues that are raised by Jessie that need to be
15 addressed right now; one of them is the issue of medical
16 care. And as a minor, she is not allowed to consent to
17 her own medical care, and the parents are going to play a
18 role in this decision-making, as Judge Hepner already
19 pointed out.

20 So this is especially urgent because at this
21 age, if you can kind of get in there before - - - you
22 know, between the ages of, like, I don't know, twelve and
23 eighteen, you can make a difference in the effectiveness
24 of the care and just the - - - the, sort of, power of the
25 decision. So if young people can start taking hormone

1 blockers, that leaves a lot of things open for them and it
2 delays the onset of puberty. And also, if they can start
3 taking cross-gender hormone therapy in an earlier age, it
4 may be more effective. So it raises the issue of how to
5 get that care covered.

6 And it also raises the issue of the name change.
7 So, again, a minor cannot bring their own name-change
8 petition; it has to be brought by a parent or a guardian.
9 And if both parents consent to it, then it's a pretty
10 smooth procedure; but that's often not the case, as we see
11 here. And I think it comes down to who has the legal
12 right to make decisions about this.

13 In a case of a parent who has relinquished their
14 legal rights to make decisions, then you can just notify
15 the parent and move on, or make a due-diligence - - - make
16 your attempts to notify the parent, and move on. But if -
17 - - if the parent does have legal rights, then they could
18 potentially object to the name change, and that leaves the
19 young person in a bad position until they're eighteen and
20 they can do it on their own.

21 JUDGE HEPNER: So I think we've come to the end
22 of our program. What we wanted to do with these scenarios
23 is present fact patterns that would be seen by clerks in
24 petition rooms filling out papers on behalf of families,
25 lawyers representing their clients, court attorneys who

1 conference cases for the judges, and finally, the judges
2 who would see these scenarios in the courtroom.

3 Go ahead.

4 KIMBERLY FORTE: I just wanted to make one last
5 point. We know that sometimes, with legal names, we can't
6 always change our dockets because it says So-and-So versus
7 So-and-So, and - - - and Pooja gave us - - -

8 JUDGE HEPNER: Right.

9 KIMBERLY FORTE: - - - great examples of how we
10 can avoid some of that. When it comes to young people,
11 their name is going to appear throughout the case and
12 they're - - - you know, they're a party to that case. So
13 I would firmly advocate that you consider using "formerly
14 known as" as an - - - as - - - so in this case, saying
15 that the child's name is Jessie and - - - and she's
16 formerly known as Justin, in your paperwork, in the court,
17 in the file; ask that the parties involved call her Jessie
18 throughout the proceeding; ask that the experts involved
19 also have their documents, you know, reflect such, and
20 that Jessie be the name be (sic) used.

21 It's really important that if this young person
22 is going to go through this very grueling process of a
23 custody battle between their parents, that they're
24 affirmed throughout that entire process, and "formerly
25 known as" is a way to do that if in fact that legal name

1 change has - - - hasn't been able to happen for Jessie in
2 this circumstance.

3 JUDGE HEPNER: So, thank you. Yes?

4 UNIDENTIFIED SPEAKER: Question.

5 JUDGE HEPNER: Do we have time for questions,
6 timekeeper? Five minutes? Yes?

7 Who has the mic?

8 UNIDENTIFIED SPEAKER: So in determining the
9 best interest - - - in determining the best interest of
10 the child and listening to the expressed interest of the
11 child, how have you dealt with the situation where the
12 child is older - - - let's say a teenager - - - and there
13 is parental alienation by one parent against the other
14 parent, who's transgendered, and the child is adopting
15 that parent's approach?

16 JUDGE HEPNER: That's obviously another factor.
17 One of the factors we look at is how much is one parent's
18 behavior and verbalizations infiltrating into the
19 children's minds, how much are they poisoning a child
20 against another parent. And it won't be any different for
21 the transgender parent than it is for a nontransgender
22 person. If there is a basis for deep ingrained hate, it's
23 going to be there.

24 KIMBERLY FORTE: I think the - - - the response
25 to that is, one, there's a lot of new research on the

1 concept of parental alienation and that it's actually not
2 - - - not an actual thing anymore, in accordance with how
3 they do evaluations of custody. So, getting educated on
4 that exact topic and doing the investigation into what
5 factors people used to use that terminology for, but
6 what's going in when - - - when parents are influencing
7 the minds of their young children, to getting an
8 independent evaluator that's not associated with either
9 party, and really talking to that young person - - - look,
10 when you have an adolescent, it's hard to force them to do
11 anything. I'm sure, if any of you are parents of
12 adolescents, you very well know that. I've represented
13 them for years. I know that.

14 So the reality is - - - is trying to put as many
15 measures in place that that young person has someone to
16 express their concerns to, what they're feeling, their
17 fears if that's where this is rooted out of, and really
18 how they're feeling. Sometimes it's fearing the loss of
19 the other parent that is really going on here, and not so
20 much not an acceptance of their parent who may identify as
21 transgender, or anything else, but really the fear of
22 losing the parent who says, like, "If you go live with
23 them, I'll never speak to you again."

24 So, you know, it's really getting to the heart
25 of what that young person is facing, and trying to work

1 them to a place where they can at least spend some time
2 and see that relationship and see how it flourishes,
3 because ultimately we - - - in family court, we should be
4 fostering as - - - or taking as many opportunities to
5 foster a family for young people, because what we know is
6 all studies prove that children need their parents, both
7 parents, as - - - as often - - - as possible.

8 UNIDENTIFIED SPEAKER: Um-hum.

9 UNIDENTIFIED SPEAKER: In the example of Peter
10 and Ellie and - - - concerning Jessie, to what extent can
11 you direct therapy of Ellie as a condition of visitation?
12 And what if Ellie had insisted that - - - refused the
13 therapy on a religious basis?

14 JUDGE HEPNER: I think you'll find a lot of case
15 law that says you can't condition but you can recommend.
16 And you can - - - even if you're not conditioning it on
17 therapy, you can put parameters in your order that say you
18 must demonstrate that you have, however you've done it,
19 become more affirming, become less rigid, become more
20 accepting. You know, people can do that talking to their
21 ministers, going to, you know, any kind of spiritual
22 involvement. I mean, there're a lot of ways to get to the
23 point of recognizing that we're all the same, we're all
24 one people. And, you know, I think you can ask people to
25 come and demonstrate in openness, however they choose to

1 do that.

2 All right, so I hope this has been helpful.
3 This is not a program that answered a lot of questions;
4 this is a program that raised issues. Each one of these
5 scenarios could have been a very long training in and of
6 itself. We recognize that we didn't intend to make this a
7 training on that but, rather, to just acquaint you with
8 what you might be seeing in your various roles as we go
9 forward, now that we have marriage equality and now that
10 we have recognition of many different types of family
11 constellations.

12 So, thank you for coming.

13 KIMBERLY FORTE: Thank you.

14 (Proceedings are concluded)

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript of proceedings in the New York State Judicial Institute, entitled "Transgender Litigants in the Court System", was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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